SCC File No.: 33880

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE MANITOBA COURT OF APPEAL)

BETWEEN:

MANITOBA MÉTIS FEDERATION INC., YVON DUMONT, BILLY JO DE LA RONDE, ROY CHARTRAND, RON ERICKSON, CLAIRE RIDDLE, JACK FLEMING, JACK MCPHERSON, DON ROULETTE, EDGAR BRUCE JR., FREDA LUNDMARK, MILES ALLAIRE, CELIA KLASSEN, ALMA BELHUMEUR, STAN GUIBOCHE, JEANNE PERRAULT, MARIE BANKS DUCHARME and EARL HENDERSON

APPELLANTS

AND

ATTORNEY GENERAL OF CANADA and ATTORNEY GENERAL OF MANITOBA

RESPONDENTS

FACTUM OF THE INTERVENER THE ATTORNEY GENERAL OF SASKATCHEWAN

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PART I - OVERVIEW OF POSITION AND STATEMENT OF FACTS

1. The specific issues raised by this appeal concern the interpretation and implementation of sections 31 and 32 of the *Manitoba Act, 1870*.[1] However, the appeal raises broader questions with respect to the propriety of litigating historical grievances and the relationship between Aboriginal title and fiduciary duty. It is the Attorney General's position that litigation with respect to historical grievances generally should not be encouraged and that the policies behind limitation periods, the doctrines of laches and acquiescence and mootness are all well founded. It is also the Attorney General's position that the overall relationship between the Crown and Aboriginal people is better described by the principle of the honour of the Crown than by fiduciary duties. The Crown does not act as a fiduciary when it extinguishes Aboriginal title and the Crown only acts as a fiduciary with respect to the disposition of land after extinguishment if the Crown has agreed or undertaken to do so. No such agreement or undertaking exists in this case. It is, therefore, the Attorney General's position that the appeal should be dismissed. The Attorney General accepts the Statement of Facts set out in paragraphs 1 to 33 of the Factum of the Respondent, the Attorney General of Manitoba.

PART II - STATEMENT OF ISSUES

2. While the Appellants have referred to a large number of issues in their Factum, the Attorney General intends to address only the following: (a) the propriety of litigating cases concerning historical grievances; (b) the applicable constitutional principles; and (c) the relationship between Aboriginal title and fiduciary duty.

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[1] *Manitoba Act, 1870*, R.S.C. 1985, Appendix II, No. 8.

PART III - ARGUMENT

A. Litigating Historical Grievances

3. This Court has previously recognized that limitation periods and the equitable doctrines of laches and acquiescence are applicable to claims made by Aboriginal people, including claims based on fiduciary duties. In *Lameman*, the Court noted that one of the policy reasons supporting its decision was that "evolving standards of conduct and new standards of liability eventually make it unfair to judge actions of the past by the standards of today."[2] The Appellants take the position that because they are merely seeking a declaration, their action is not statute barred. They rely upon *Ravndahl*.[3] However, even if their position is correct, a declaration is an equitable remedy. It is discretionary and it is clearly subject to the equitable defences of laches and acquiescence and mootness.

4. It is the Attorney General's submission that, notwithstanding their remonstrances to the contrary, what the Appellants are attempting to do is to apply 21st century legal standards to 19th century conduct. The Manitoba Metis did not litigate with respect to the implementation of section 31 in the 1870's because, quite simply, they had no cause of action at that time. Recent decisions of this Court do not create a cause of action or revive a barred cause of action. After the passage of so many years, debates with respect to the implementation of section 31 and other historical grievances should be left for academia or the legislature and should not be the concern of the courts.

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[2] *Canada (Attorney General) v. Lameman,* [2008] 1 S.C.R. 372 at para. 13; see also *Wewaykum Indian Band v. Canada,* [2002] 4 S.C.R. 245 at paras. 81 and 108; *McCallum v. Canada (Attorney General)*, 2010 SKQB 42 at para. 38 and *Oneida County v. Oneida Indian Nation* 470 U.S. 226 (1985), per Stevens J. dissenting.

[3] *Ravndahl v. Saskatchewan,* 2009 SCC 7; see also, *Chippewas of Sarnia Band v. Canada (Attorney General)*, [2001] 1 C.N.L.R. 56 (Ont. C.A.) at paras. 243-310.

5. A further reason for the Court to refuse to deal with the merits of this case is found in the *Quebec Secession Reference*.[4] In that case, the Court indicated that courts have no supervisory role over the political aspects of constitutional negotiations and that courts should not attempt to pass judgment on what are essentially political issues involved in these negotiations. It is submitted that similar concerns exist in this case. What the Appellants are seeking, in essence, is a re-evaluation and re-writing of the terms pursuant to which Manitoba joined Confederation in 1870. It would not have been proper for the Court to entertain such case in the 1870's and it is submitted that it is not proper for the Court to do so 140 years after the fact.

B. Applicable Constitutional Principles

6. Beginning at paragraph 64 of their Factum, the Appellants refer to the constitutional principle of "respect for minorities" which was recognized by this Court in the *Quebec Secession Reference* as one of the four fundamental and organizing principles of our Constitution. The Appellants say that section 31 of the *Manitoba Act* must be interpreted in light of this principle. The Attorney General does not deny the applicability or significance of this principle. However, it is the position of the Attorney General that the Court should also pay heed to the principles of "democracy" and "the rule of law" which were also recognized in the *Quebec Secession Reference* as pillars of our Constitution.[5]

7. As stated at paragraph 49 of the *Quebec Secession Reference*, no single principle can be defined in isolation from the others and no one principle trumps or excludes the operation of any other.[6] The principle of democracy is relevant to this appeal in two ways. First, the provisional government at Red River approved the *Manitoba Act*, including the discretion provided to the

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[4] *Reference re: Secession of Quebec*, [1998] 2 S.C.R. 217 at paras. 100 and 101.
[5] *Reference re: Secession of Quebec*, *supra*, at paras. 61-78.
[6] *Reference re: Secession of Quebec*, *supra*, at para. 49.

Governor General in Council and the Lieutenant-Governor under section 31, in June, 1870. Second, the Manitoba Legislature, which was initially controlled by the Métis and their supporters, was provided with authority over "property and civil rights" and "local matters" under section 92 of the *Constitution Act, 1867*[7] and therefore had the ability to protect the beneficiaries of section 31.

8. It is submitted that the principle of the rule of law is also relevant to this appeal. One aspect of this principle is referred to in the following passage from the *Quebec Secession Reference*:

> Given the existence of these underlying constitutional principles, what use may the Court make of them? In the *Provincial Judges Reference, supra*, at paras. 93 and 104, we cautioned that the recognition of these constitutional principles (the majority opinion referred to them as "organizing principles" and described one of them, judicial independence, as an "unwritten norm") could not be taken as an invitation to dispense with the written text of the Constitution. On the contrary, we confirmed that there are compelling reasons to insist upon the primacy of our written constitution. A written constitution promotes legal certainty and predictability, and it provides a foundation and a touchstone for the exercise of constitutional judicial review. [Emphasis added.][8]

9. Much of the Appellants' Factum is devoted to an argument that statements made by Sir John A. Macdonald and Sir George-Etienne Cartier either in parliamentary debates or in private meetings with the representatives of the provisional government should be given legal force because they define and determine the extent of a fiduciary obligation being undertaken by Canada in connection with section 31. It is submitted that the Appellants' position is fundamentally at odds with the rule of law principle. It is the words of the statute that govern. It has long been recognized that statements made by individual members of a legislative body, including the Prime Minister, do not determine the "intention of the legislature". The Appellants cannot avoid this principle simply by saying that a fiduciary obligation was incurred. While the Attorney General does not suggest that

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[7] *Constitution Act, 1867*, R.S.C. 1985, Appendix II, No. 5.
[8] *Reference re: Secession of Quebec*, *supra*, at para. 53.

these statements are irrelevant or inadmissible, the jurisprudence of this Court clearly stipulates that they are entitled to little or no weight.[9]

C. Fiduciary Duty and Aboriginal Title

10. The Attorney General agrees with the finding of the Trial Judge that the Métis did not possess Aboriginal title to any lands within Manitoba immediately prior to its establishment in July, 1870.[10] The test for ascertaining Aboriginal title has been laid down by this Court in *Delgamuukw*[11] and *Marshall; Bernard.*[12] The Manitoba Métis cannot meet this test quite simply because they did not have exclusive possession of the land and they did not hold title to their land collectively. The lands were in fact and in law subject to the jurisdiction of the Council of Assiniboia and had been for many years.

11. At paragraphs 476 to 509 of its judgment, the Court of Appeal discusses the relationship between Aboriginal title, cognizable interests and the existence of fiduciary obligations. While the Court of Appeal ultimately reached no conclusions with respect to these issues, it suggested that the existence of Aboriginal title generally, or Aboriginal title in some other location, could be a sufficient foundation for the existence of a fiduciary obligation with respect to specific lands. With respect, the Attorney General disagrees. The search for a cognizable interest in land is not the *sine qua non* of a fiduciary obligation. It is only one piece of evidence which points to the existence of a fiduciary obligation. They key question should always be whether the Crown has agreed or undertaken to act as a fiduciary. In the absence of a cognizable interest with respect to the specific lands in issue, it is unlikely that the Crown will have agreed or undertaken to act as a fiduciary. The

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[9] *R. v. Heywood*, [1994] 3 S.C.R. 761 at para. 43; *Reference re: B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486 at pp. 504 – 509; and *Reference re: Upper Churchill Water Rights Reversion Act*, [1984] 1 S.C.R. 297 at p. 319.

[10] Trial Judgment, at paras. 562 – 594; however, the Attorney General disagrees with the Trial Judge's conclusion that the relevant time for determining Métis Aboriginal title claims should be changed from the date of the assertion of sovereignty to the date of effective control.

[11] *Delgamuukw v. British Columbia*, [1977] 3 S.C.R. 335.

[12] *R. v. Marshall; R. v. Bernard*, [2005] 2 S.C.R. 220.

existence of a cognizable interest in land someplace else is, in the Attorney General's view, of little relevance to this question.

12. The Court of Appeal's conclusion that the delays in this case were not excessive is consistent with the decision of the Saskatchewan Court of Appeal in *Lac La Ronge Indian Band v. Canada* which dealt with a claim concerning unreasonable delay in the setting apart of reserve lands promised under Treaty No. 6. The Band adhered to Treaty No. 6 in 1889 and immediately requested its reserve land. The Court of Appeal held that there was an implied term that the land would be set apart within a reasonable time. The Court of Appeal went on to hold that the Band was only entitled to damages with respect to lands not set apart by 1909, which was twenty years after the initial request. It is significant that the Court of Appeal did not consider a twenty year delay in setting apart reserve lands in a relatively remote and isolated part of the North West Territories to be unreasonable.[13]

13. It is the position of the Attorney General that even if the Manitoba Métis possessed Aboriginal title to lands within the new province in 1870, this fact alone does not infuse section 31 with fiduciary obligations. It is the Attorney General's position that when the words of section 31 are properly considered within their historical context, it is clear that the Crown was not undertaking to act as a fiduciary in the distribution of lands to the Métis children.

14. Six points must be made. First, the essence of a fiduciary obligation is the requirement of the fiduciary to act with utmost loyalty and to act in the best interests of the beneficiary and only in the best interests of the beneficiary. As stated by the Court in *Ermineskin,* "a fundamental principle

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[13] *Lac La Ronge Indian Band v. Canada,* 2001 SKCA 109 at para. 159; application for leave to appeal dismissed [2002] 3 S.C.R. xii.

underlying the fiduciary relationship is the requirement that a fiduciary acts exclusively for the benefit of the other, putting his own interests completely aside."[14] Second, while the Court has indicated in cases such as *Sparrow*[15] that the relationship between the Crown and Aboriginal peoples is generally speaking fiduciary in nature, the Court has also made it clear that this is not a plenary duty and that fiduciary obligations do not attach to all aspects of the relationship.[16] Third, the Court has recognized that the Crown can be no ordinary fiduciary. The application of fiduciary obligations is inappropriate where the Crown is required to balance Aboriginal interests against completing societal interests. As stated by Binnie J. for the Court in *Wewaykum,* "the Crown ... wears many hats and represents many interests, some of which cannot help but be conflicting."[17]

15. Fourth, the Court has recognized that fiduciary obligations will rarely arise when the Crown is carrying out its public law duties.[18] The Court has recognized that there is a dichotomy between public law duties and private law duties. In order for a statute to give rise to a fiduciary duty, this intention must be clearly expressed.[19] Fifth, the Court has recognized that the overarching principle governing the relationship between the Crown and Aboriginal peoples is the honour of the Crown.[20] As stated in *Badger*,[21] the honour of the Crown is always at stake when governments deal with Aboriginal people. In *Taku River*,[22] the Court held that the honour of the Crown was elevated to constitutional status by section 35 of the *Constitution Act, 1982*.[23] Fiduciary obligations are merely

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[14] *Ermineskin Indian Band and Nation v. Canada,* 2009 SCC 9 at para. 125; *Galambos v. Perez* 2009 SCC 48, at para 69.
[15] *R. v. Sparrow,* [1990] 1 S.C.R. 1075 at p. 1109.
[16] *Wewaykum Indian Band v. Canada, supra,* at para. 81.
[17] *Wewaykum Indian Band v. Canada, supra,* at para. 96.
[18] *Guerin v. the Queen,* [1984] 2 S.C.R. 335 at p. 385; *Fairford First Nation v. Canada (Attorney General)* [1999] 2 C.N.L.R. 60 (F.C.T.D.) at para. 67.
[19] *Elder Advocates of Alberta Society v. Alberta,* 2011 SCC 24 at para. 45; *Lax Kw'alaams Indian Band v. Canada (Attorney General)* 2011 SCC 56, at para. 72.
[20] *Haida Nation v. British Columbia (Minister of Forests)* 2004 SCC 73, at paras, 16-19.
[21] *R. v. Badger,* [1996] 1 S.C.R. 771 at para. 41.
[22] *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director),* [2004] 3 S.C.R. 550 at para. 24.
[23] *Constitution Act, 1982,* R.S.C. 1985, Appendix II, No. 44.

one aspect of the honour of the Crown which arise in specific circumstances.[24] Sixth, the Métis are an Aboriginal people both for the purposes of section 35(1) and under the common law.[25] Therefore, they are entitled to the benefit of the honour of the Crown principle.

16. It is the position of the Attorney General that whether negotiating the surrender of Aboriginal title through a Treaty or extinguishing Aboriginal title through legislation, such as section 31, the Crown cannot be seen to be acting as a fiduciary on behalf of the Aboriginal people involved. The Crown acts in its own self interest in these cases, subject only to the honour of the Crown principle. The Crown's obligations are limited to acting in good faith and not exploiting the Aboriginal people.[26] The honour of the Crown also requires statutory provisions to be interpreted liberally and generously and any ambiguities to be interpreted in favour of the Aboriginal people insofar as that can be done consistently with the intention of the legislature.[27]

17. Similarly, when acting pursuant to obligations undertaken in connection with the surrender or extinguishment of Aboriginal title, the Crown is not necessarily acting as a fiduciary. In each case, a court must ask whether the Crown has agreed or undertaken to act in the best interests of the Aboriginal people and only in the best interests of the Aboriginal people. If the Crown, in fulfilling its agreement or undertaking, is also permitted to take into account other competing interests, it cannot be acting as a fiduciary. The ability to take into account competing interests is an anathema

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[24] *Haida Nation v. British Columbia (Minister of Forests), supra*, at para. 18; J. Timothy S. McCabe, *The Honour of the Crown and its Fiduciary Duties to Aboriginal Peoples,* (Markham: Lexis Nexis Canada Inc., 2008) at pp. 57-61; Charles Pryce, "The Crown's Fiduciary Relationship with Aboriginal People and The Honour of the Crown – Differences and Similarities," Pacific Business & Law Institute Conference, *Canadian Aboriginal Law 2009* at pp. 2-3.
[25] *Alberta (Aboriginal Affairs and Northern Development) v. Cunningham,* 2011 SCC 37.
[26] *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 S.C.R. 344 at paras. 33 and 35.
[27] *Nowegijick v. Canada,* [1983] 1 S.C.R. 29; *Mitchell v. Peguis Indian Band,* [1990] 2 S.C.R. 85.

to the existence of a fiduciary obligation.[28] In this case, it is the Attorney General's position that the Crown did not undertake to act in the best interests of the Métis children in allotting section 31 lands. Therefore, no fiduciary obligation arose. In determining how and when section 31 lands would be allotted, the Crown was entitled to take into account many competing interests such as the demands of new settlers for land and the need to construct infrastructure in the new province. The Crown was subject to a public law duty with respect to the implementation of section 31. This duty was imbued with the honour of the Crown and therefore was more onerous than a bare public law duty. But the duty was less onerous than a fiduciary duty.

18. In conclusion, it is the Attorney General's position that describing the overall relationship between the Crown and Aboriginal people as fiduciary or fiduciary-like is inaccurate and reflects a mistaken view of what fiduciary relationships require – namely, acting in the best interests of the beneficiary. The Attorney General submits that the concept of the honour of the Crown is a better descriptor of the overall relationship. Fiduciary duty should be reserved for those special cases where the Crown undertakes obligations which would also give rise to a fiduciary duty in the private law context, such as cases dealing with the surrender of reserve land and the management of Indian monies. In all other cases, the honour of the Crown should be the governing principle. The honour of the Crown is a flexible principle which recognizes that the Crown can take into account competing interests. Accordingly, the honour of the Crown is better suited to achieve the goal of reconciliation which is at the heart of contemporary Aboriginal law[29] and which, by its very nature, requires balancing competing interests and compromise.[30] In this case, the Court of Appeal held that even if the Crown owed a fiduciary duty to the Métis children with respect to the

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[28] David W. Elliot, "Much Ado About Dittos: Wewaykum and the Fiduciary Obligation of the Crown" (2003), 29 Queen's L.J. 1 at pp. 8-9.

[29] *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)* 2005 SCC 69 at para. 1; *Beckman v. Little Salmon/Carmacks First Nation* 2010 SCC 53, at para. 10.

[30] Timothy Huyer, "Honour of the Crown: The New Approach to Crown-Aboriginal Reconciliation," 21 Windsor Rev. Legal & Soc. Issues 33, 2006 at pp.35-36.

implementation of section 31, that duty was fulfilled. It is the Attorney General's position that no fiduciary duty arose and that the Crown's duty in this regard is more aptly described as a public law duty enhanced by the honour of the Crown. This duty is necessarily less onerous and more flexible than a fiduciary duty. Therefore, on the reasoning of the Court of Appeal, it too was fulfilled.

PART IV - COSTS

19. The Attorney General does not seek costs and submits that he should not be liable for the costs of the Appellants or any of the other Interveners.

PART V - DISPOSITION OF THE LEGAL ISSUES

20. The Attorney General requests permission to present oral argument at the hearing of the appeal and submits that the appeal should be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED AT Regina, Saskatchewan this 22nd day of November, 2011.

P. Mitch McAdam
Agent for the Attorney General for Saskatchewan

PART VI - LIST OF AUTHORITIES

Legislation

Other